

# JOHN YOO COMPLAINS, “I AM TRAPPED ON A PLANE IN ALL OF THIS BAD WEATHER”

Poor John Yoo. Apparently now he's trapped. Or, as his lawyer said, faced with "nothing more than a political rant disguised as a lawsuit." I know you're all crying for him.

I'm a little bit late to posting about the law suit, on the behalf of Jose Padilla and his mother, against the guy who rationalized his torture, John Yoo. But that makes my punditry job easier—I can just borrow liberally from all the smart lawyers who have been debating the suit in this thread.

Though I'm not a lawyer, I agree with bmaz's take that the suit is fairly weak.

First off, as despicable as Yoo is, I am not sure he is a proper party defendant here. Secondly, I think his actions are probably entitled to qualified immunity. Third, I see a real problem establishing direct causation for Padilla's damage elements. Fourth, despite the allegations in the complaint, I am not sure that NDCA is the proper venue. fifth, it is just not particularly artfully plead.

For example, consider the venue question. The complaint cites, with no explanation, 28 U.S.C. § 1391(b)(2) and (e) as its justification for suing in Northern California. So here's the language they're using to justify filing in NoCal:

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in

[snip] (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

(1) a defendant in the action resides,

(2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

But no event described in the complaint happened in Northern California—for the most part, it happened in DC or in the brig in South Carolina, so (b)(2) doesn't seem to apply. And the complaint specifically states that they're suing

Yoo individually, not in his official capacity (presumably to try to avoid some of the immunity that extends to government officials).

Furthermore, while Yoo is currently a resident of California, I suspect he would dispute that he was a resident of California when the events occurred (though he probably maintained his voter registration in CA, so who knows). In short, it seems like this suit should be filed in DC or in SC.

And as to suing Yoo—as opposed to President Bush, John Ashcroft, Rummy, or any of the other people described as making the decision to declare Padilla an enemy combatant and subsequently to torture him—the suit appears to rely on two pieces of logic. First, they’re arguing that Padilla was improperly declared an enemy combatant. Though they don’t say it, I suspect they would argue that the government’s changing treatment of Padilla (first as a material witness, then as an enemy combatant, then as a indicted defendant, each change coming just before a Court ruling that might rule that status as improper) proves the enemy combatant—and therefore the treatment he received in the Brig—was not legal.

Presuming that’s what they’re intending (and mind you, I am imposing this logic onto the complaint, they don’t say that), then you get into the allegation that Yoo wrote an opinion that deliberately legalized this illegal designation and went on to write the opinions that legalized the illegal treatment of Padilla.

96. Upon information and belief, Defendant Yoo was personally involved in formulating the recommendation to President George W. Bush that Mr. Padilla be detained without charge as an “enemy combatant.” The actions of Defendant Yoo proximately and foreseeably caused Mr. Padilla to be seized from the civilian criminal system and transferred to military detention.

97. Upon information and belief,

Defendant Yoo personally participated in and/or approved the decision militarily to detain Mr. Padilla with the intention of subjecting Mr. Padilla to conditions of confinement designed to coerce from him potentially self-incriminating evidence, to shield the illegal detention and interrogation from judicial review, and to deprive Mr. Padilla of due process of law, proximately and foreseeably causing harm to Mr. Padilla and Ms. Lebron.

98. Defendant Yoo authored the legal opinion recommending that Mr. Padilla could be taken into custody as a military combatant. Defendant Yoo himself has publicly asserted that Attorney General Ashcroft relied on this opinion in recommending Mr. Padilla's seizure out of the civilian justice system and detention without charge in a military prison.

Though, IMO, this logic doesn't hold up, as the government always maintained that the criminal indictment in civil court did not rescind Padilla's enemy combatant status.

The threat of re-detention is not a figment of Mr. Padilla's imagination. On or about November 23, 2005 – shortly after the criminal indictment against Mr. Padilla was made public – Deputy Solicitor General Gregory Garre informed Mr. Padilla's counsel, Jonathan Freiman, that it was the government's position that the "enemy combatant" designation had not been rescinded and that the government could therefore militarily redetain Mr. Padilla at any time based on his alleged past acts.

But then, the suit is much vaguer than I'm making out here, and one of the central intents of this suit appears to be to get Padilla's

status as an enemy combatant back before the Courts. There's no way Padilla could win this suit, after all, unless a court ruled that his designation as an enemy combatant was improper.

Now, all that's my take before you get to the question of whether or not Yoo is entitled to immunity for his actions (see bmaz, masaccio, and Mary debating that). And, as bmaz points out, we won't get to discovery if we don't overcome the jurisdictional issues, including immunity but also venue.

So, on balance, I guess I'm agreeing with bmaz. I don't see how this suit gets to the fun part of discovery, for the several reasons bmaz mentions. But I'm not sure that's the point, yet. Most optimistically, it seems designed to re-open the question of whether Padilla was properly designated an enemy combatant. That might actually work if the plaintiffs work this suit in different venues. But even at the most basic level, this is going to push judges to weight their own self-respect against the government's claims that it can break the law without any legal consequences. As masaccio argues,

It looks like the point of the complaint is the vivid description of the torture. In the decision, first the judge writes out all of that, stating that the facts stated by the plaintiff are entitled to a presumption of correctness, accompanied by dozens of cites. Then the judge has to patch together some kind of argument to get Yoo out. The contortions in that part will be obvious to a casual observer, and the question is the limits of the willingness of the judge to show to the world that the judge possesses the level of intellectual dishonesty that will be required.

One final thing. The neatest thing about this suit is the way it uses good conservatives against the government. If I'm right about the

possibility of using the government's changing claims as to Padilla's status, then Michael Luttig's opinion on those little games comes into play. It relies on past testimony from several people who work at the Brig where Padilla was tortured. And, most neatly, it relies centrally on Jack Goldsmith's claims about the Yoo's role in the various memos at the heat of the case, as well as Goldsmith's stated opinions about how crappy they were.

I doubt this suit, as filed, will ever get to Court. But if it does, it would rely on a long parade of very uncomfortable conservatives having to denounce the torture their party leaders endorsed.